

Fox Rothschild Podcast

The Presumption of Innocence Podcast Series: Episode 19

The Fifth Amendment & Its Role in Parallel Proceedings

Featuring Matt Adams and Jack Siegel of Fox Rothschild LLP

Adams: Hi everyone, and welcome to "The Presumption of Innocence," a podcast brought to you by the [White-Collar Criminal Defense and Regulatory Compliance Practice](#) at Fox Rothschild. I'm your host today, [Matt Adams](#). I'm one of the co-chairs of the practice, and I am delighted to be joined by one of my newest partners, [Jack Siegel](#), who is resident in our Boston, Massachusetts, office, a relatively new market for the firm.

And really happy to be with Jack. He's got more than 20 years of experience in white-collar litigation, and he is particularly active in the financial, health care, technology and government contracting industries.

And today, Jack and I are going to talk about the Fifth Amendment.... in particular, the way that the Fifth Amendment weaves itself into parallel proceedings. And by parallel proceedings, where the same set of common facts is being examined, both civilly, criminally and potentially even in some sort of regulatory forum. And the list goes on and on, you could have multiple parallel proceedings stacked up, and the Fifth Amendment becomes an interesting issue.

Jack, I want to just start by just talking about some circumstances where a client can find itself into one of these parallel proceedings. As I see it, the possibilities are pretty limitless because there's more regulatory enforcement action perhaps than ever before going on in our country right now.

That can lead to a criminal referral to the Department of Justice or a state counterpart. And then you got civil litigation that seems to just happen all the time, whether it's strategically filed civil litigation, or it's all directed out of the same transaction or occurrence that potentially could give rise to some sort of criminal prosecution or regulatory enforcement action.

But, in your practice, where do you see this happening the most?

Siegel: I usually see a two-pronged attack by a government entity or agency like the Department of Justice, Civil, the Department of Justice, Criminal. But like you said, I don't think I can possibly come up with all the possible combinations. And then to make things interesting is, when there's one, there's always the other potentially lurking. And when the other is potentially lurking, you have to be open-minded to what other private litigation might ensue at the same time.

I agree with everything that you've said. The concepts that we're going to be talking about, they come up and will continue to be an issue for the foreseeable future.

Adams: Yeah. And one of the things that I find, as a defense lawyer, as particularly challenging -- although I invite the challenge and welcome it because that's who defense lawyers are, you can

always trust the defense lawyer. Your favorite and most relied upon resource in the room because usually you need one when the chips are down.

But I find the level of cooperation in parallel proceeding among the civil, the regulatory, the criminal, is just astonishing. A particular civil investigative demand comes to mind, that I was involved in personally in New York not long ago, where, every time we had to have a telephone conference, it was like hearing a football team. Because the government has the civil agents, the civil prosecutors, the criminal investigators, the criminal prosecutors. Then there's even sort of regulatory folks that are lurking in the background and then their experts because it's health care and they've got physicians advising them. And moving that apparatus against a single defendant is just pretty astonishing.

Siegal: So, in the Northern District of Indiana, I had a client that was being investigated for alleged False Claims Act Violations. At the same time, there was a grand jury that was being convened. IRS Agents and Department of Justice Agents were running around everywhere talking to witnesses and people were being subpoenaed to this grand jury.

This is in the height of COVID, so the courthouse is completely empty. And we go into this basement where I meet with the civil DOJ lawyers, the civil AUSAs and right there are the IRS investigators, and the criminal investigating team.

Every time we go through a presentation of where this case should fall on the spectrum of culpability. And, you know, they're copiously taking notes and you have to be conscious of everything that you're doing and saying the whole time to think, okay - - and making judgment calls in order to affect the best civil outcome -- am I revealing too much that might accidentally assist because everything I do or say on behalf of the client is going to be used against the client.

Adams: In the ordinary course, if it was just simply a criminal investigation, you could say, "Okay, I take five, I'm sitting back."

Siegal: Yeah.

Adams: "I recognize my obligation as an entity to cooperate under doctrines like the Active Production Doctrine and producing..."

Siegal: mm-hmm.

Adams: "...documents." But as an individual in particular, I ordinarily wouldn't have to participate in that investigation. You could just respectfully decline. But the dynamic shifts when you have the civil component pending because of some significant Fifth Amendment concerns.

So talk to me about that fact pattern: The government civil versus government criminal proceeding down these parallel train tracks and how you've historically navigated Fifth Amendment issues in that particular context.

Siegal: The first thing is to really know what your records say. So, you gotta get out in front of that first. And you cannot take your client necessarily, you don't wanna take your client's words for it, 'cause they are in shock. They're in shock that it's all happening. You can't be the observed and the observer. So, yeah, the service we render is, we're able to first of all, make some kind of neutral assessment. Then we try to work with the government to try to figure out is there ways in which we can satisfy the government from the civil perspective? It's usually the civil people that have the

remedies available to them to compel you to produce information. And invoking the Fifth Amendment is something you don't want to do willy-nilly or without thought.

So, you've got to think about, of course, once the cat's out of the bag, can't put it back in the bag. It's what waiver is. So, you have to be careful about these things. And you never want to hasten the government. You kind of want the government getting in its own way, to some extent.

So, there is no real pull-it-off-the-shelf strategy. It's really knowing what you have, what needs to be turned over, what kind of negotiation you can enter into. There could be parallel proceedings, but they're coming at you from different subject matter areas or different areas of concern, potentially.

And you can find that step through wiggly room. Like, you know, you're double teamed on a basketball court, you step right between the two defenders. Like you gotta find that step through. Make sure the client is informed of all the risks. But you have to somehow satisfy the federal because you also don't want to obstruct justice. But you also have what are very powerful civil remedies that can be enforced against you. And you don't want to go into a complete -- I'm not saying this in all cases, all facts specifically -- but you don't necessarily want to go into armadillo mode or turtle mode and just go into your shell.

Adams: I like that. I like that. "Armadillo mode."

Siegal: Yeah. So the specific fact patterns are, you gotta look at what the government is coming at you for. You gotta know what it is or where your client stands in terms of potential exposure, right? You gotta be smarter on that. And then you gotta make sure you're absolutely a hundred percent truthful in every way in which you present the situation to the government putting your client in a tight spot.

Adams: When I describe this sort of dance to clients, I frequently refer to it as waltzing through a minefield, because at every little turn, at every little saunter, you may have another potential pitfall. And you keyed to it quite well when talking about government-centric investigation, civil, criminal, regulatory, all bearing down. In so much as civil discovery devices are so much easier and so much more expansive than criminal. And in my experience, purely civil litigators who don't necessarily practice in the type of cases that you and I do have a difficult time appreciating the idea that in the criminal realm, the right against self-incrimination is the peak. It's the coup de grâce. And that is a very powerful tool to ensure that the government is held to its proofs and that the presumption of innocence is maintained, but has to be tempered against what usually is an onslaught of civil investigative demands and other civil process that's being utilized in the backend, in the back room at the U.S. Attorney's Office or in some regulator's office to bring potential information to bear that could have criminal consequences.

So, I know what my conversation about taking the Fifth comes to be with a individual who is faced with that two-headed snake coming at them from the government. What's yours look like?

Siegal: Well, my conversation is usually, like, I'm gonna keep you away from having to testify or anybody who could be held binding the company or anybody that's potentially in harm's way, away from providing testimony until the very last minute if possible.

And as we creep up to that, what we need to do in the meantime is use whatever tools we can to build a defense. We need to figure out what your defense is gonna be. And it depends on the claims. It depends on what the exposure looks like. It depends on how defensible the case is. So, all of this advice is modulated by those kinds of factors. But, it's usually the driver because no one wants to

lose their liberty, so it really depends. What I usually tell clients is, " There's gonna come a time where we have to make that decision and, you are going to risk liberty, the death of your company or, life will change in a dramatic way for you. But before we do that, let's do everything we can to exhaust our ability to build a defense."

And that's why some of the conversations I have early on is, we need to think of everyone. Everyone who might be outside of the company that might be witnesses for the government. And we need to think about if any one of them were involved in any way in contributing to our situation and whether or not there are claims that we might be able to bring against them. So, before I have to cross that rubicon of the Fifth Amendment, I can go ahead and use my civil skills to file strategic lawsuits to build my client's defense and put ourselves in the best position when it comes to trying to navigate giving me more information or more tools, and more importantly, sometimes other people's money in defending a case.

Adams: And I think you just hit to a T, two important things that I think every white-collar defense lawyer needs to navigate from the outset: Knowing your facts and knowing your client. And knowing when you have to say to a company, for example, we've gotta peel off and get individual executives their own counsel because we as a company may ultimately have to be producing certain documents because of a grand jury subpoena or a civil investigative demand. But those individuals may themselves have individual rights that they can assert to avoid that individual culpability.

And I think there's some very high-profile examples in just the past month or so of law firms that got out over their skis a little bit in connection with this very issue. They're representing both the company and the executives. They're conducting internal investigations, gathering information to know their facts. But at the end of the day, once they learned their facts, their facts weren't good for those executives that they represented, and they had that Hobbesian choice that you mentioned is like, where do we go from here now?

In my assessment, where those high-profile examples went wrong is that was the time to think about withdrawal, because you're now conflicted. You're now armed with information and your two clients are at an impasse and you can't possibly advance the interests over the others.

Now, there's some cynics that would say that those lawyers made the obvious choice in pursuing the interests of the company because they were the monied client. But I have a very strong belief that's gonna cost them ethically, dearly, down the line. And my ethics would never allow me to do that. So, when I say, "know your client," that second issue that pops up there is, in these types of parallel proceedings, the witness-subject-target trichotomy is really crossing over. These aren't neat parallel lines. In fact, I don't even know why we call them parallel proceedings. It's just the nomenclature. Because there's all kinds of weaving in and out, and I'm not even sure the right geometric phrase to describe that. But I got squiggly lines intersecting all over the place.

And knowing your client is really one of the most important things to keep a hold of. Because I've been in health care situations, for example, where there's medical records from a practice that are being requested to use as evidence in both the regulatory and criminal action against an individual physician that that practice absolutely has to turn over. But that particular individual physician would probably, at the end of the day when facing down the barrel of the deprivation of liberty that comes with a criminal conviction, would probably take five and would probably say, "I'm asserting my Fifth Amendment." The practice doesn't have the ability to do that!

So, talk about a little bit of that interplay of knowing your facts and knowing your client because...

Siegal: Yeah.

Adams: ...that's at the essence of what we do. I know of no other area of the practice of law where you actually have to have skills in both civil law and criminal law and the investigative aspects of navigating all this before there's even complaints filed or indictments rendered.

Siegal: Yeah. And you brought up ethics. Like it's not just ethics, it's, you know, privileges, rules of evidence and how you want to be as a lawyer. What I try to do is explain to them --well, and it also depends on what kind of company, like you deal with some pretty large companies. I deal with some, you know, like you have one person on the top, there's not really a board, you know, but you can have everywhere in between. So, sometimes the company and an individual are the client. Sometimes there's other constituencies and other bodies and you gotta figure out, navigate, this is now, we've gone into business organizations and corporate law, right?

Adams: Right.

Siegal: You've gotta understand, who are the final and ultimate decision makers. Who is your client, right? And then it really starts from that introductory beginning interview process, when you go and meet people for the first time. You want to do that quickly. As soon as you know something's... not just, 'cause you gotta preserve everything, but you gotta try to figure out, okay, where might these issues come up?

And do it early and give them the warning, the Upjohn warning, and any other warning, whether required or not, so that they understand a hundred percent from the beginning: I represent this person, not you. Anything you say can and will be used against you if we deem it necessary.

Adams: Even though I'm not a cop, I'm just a private lawyer.

Siegal: I'm just a private ... but yeah, I just gotta tell you that if we will, you know, what you tell me is confidential until it's not. And you can have somebody else here appear for this area.

And sometimes people are like we don't wanna make people nervous. So, there's a whole bunch of competing concerns where you have to know your client to know what you can... you know, 'cause I can be "conservative Jack" when it comes to like how everything has to be by the book and absolutely, that may not work for your client in terms of the culture that they have and their own personalities and the way that your client just operates. And you have to figure out these personalities and you have to work with them. But you have to check some basics to get people to understand that their cooperation is expected as loyal employees, and their cooperation is expected, but I do not represent you. And what you tell me will be used for the benefit of my client. And then it's less of a surprise. Because I've turned around and had to sue employees. After it came out that the initial interview led me down one path, and then it turned out that, oh, they were a lot more involved in this.

And then you have to make arguments that negate cyan or like adverse agency or whatever you can use to basically say, "Hey, these people were rogues." But you didn't know they were rogues until later on down that process. But then when you have to cut them loose, they can't say, "Hey, you know, you promised this stuff is confidential. I thought you were my lawyer."

No, there's absolutely no confusion here about who I represent. I think with those law firms, when they get in over their skis, what they do is, they want their clients to feel safe and they want the people they're gonna talk to, to feel safe. And they want to create this circle of trust. They're thinking

in the moment. And they could save themselves, because they essentially have to admit to a court of law that, yeah, they committed unethical infractions, but did it for a great, zealous advocacy reason. Right?

Adams: Right.

Siegal: I tend to agree with you that at some point, that just starts to come back to you.

Adams: Yeah, absolutely. We're talking a lot about a circumstance in a parallel proceeding where the government is driving the show, both civilly, criminally, regulatorily?

Siegal: Yes.

Adams: If that's a word? And let's move the aperture a little bit to a different scenario, if you will.

Siegal: Sure.

Adams: And let's talk through the Fifth Amendment implications there. The government is looking at something criminally and in the white-collar world, unlike in the more street crime world, we tend to know when the government is looking at something criminally. The grand jury's subpoenas start flying. Investigative demands, although civil in nature, start flying. A search warrant occurs.

But let's talk about where there is a government investigation and a private civil action, and how we navigate Fifth Amendment and other privilege concerns in that environment. Because that's a bit different, right?

When the government is staring down the barrel of that double barrel shotgun -- if we can use as many metaphors as possible during this conversation today, as is maybe our goal --but when they're staring at you with that ability to bring both civil and criminal sanction against you, how does it change when one of the parties is a private litigant? One of them is a private plaintiff that is operating in that civil sphere that the government also operates in. Does it change at all?

Siegal: What happens is I feel a lot less bullied by the private lawyers that show up. And there are a lot of ways to deal with them. And you can push back on who these people are, how pristine are they to be bringing claims? What standing do they have to bring claims? They wanna bring class action? We can drag that out for a while. Time is on my side as far as I'm concerned when it comes to these civil--

Adams: A lot of strategy.

Siegal: Yeah. Like I can throw up plenty of lawn chairs in their path as they're running around the track, turn it into a steeplechase. So at that point I can basically say, "Hey you can go complain all you want to the court, I'm going to comply with the rules of discovery."

But I feel a lot more comfortable being like, you know, objection to a private party, than to appear less cooperative to the government. I mean, the Fifth Amendment concern there is if the ultimate issue is determined and we invoke the Fifth, then adverse inferences can be drawn.

Adams: I was just gonna say --

Siegal: Yeah, so--

Adams: You don't wanna do that.

Siegal: Delaying that point is the whole game.

Adams: But in the ultimate question, and I've had meetings with clients, as I'm sure you have, where I've said we're at that phase.

Siegal: Yeah.

Adams: We're at that point where you are now gonna have to sit and answer the ultimate question in a deposition. And I am still advising that your liberty is at stake if you answer these questions, but you have a decision to make. And that is, are you invoking or are you not? And nine times outta 10, that conversation ends in the client saying, "I'm invoking."

Siegal: Yes.

Adams: Because they know what went on.

Siegal: Yes.

Adams: And the chips fall as they may in the adverse inference world. But talk to me about your experiences there.

Siegal: Yeah, so what I tell the clients is I'm like, look, I could care less about the civil action. It's money damages. How many each of these cases go to trial? We'll figure out some kind of solution. This is gonna alter, at the end of the day, the cost benefit analysis when it comes to settlement. We have to weigh it in the totality of that balance. But, today militates in favor. So you say nine out of 10, I think it's 9.85 out of 10.

Adams: I was being charitable. I've, yeah. Yeah.

Siegal: I appreciate that.

I've never had a client say no. I definitely ... that was the only time. Yeah, the only time when I tried to dive across the table to stop them, you know, so I got, you know, I got knocked out or something.

But like, um, yeah, you know, I would say no. Because I think I can, you know, first of all, an adverse inference is just an inference. So, if you're a trial lawyer, you don't just give up and go, "Oh, there's an adverse inference. It's all over." You can try to rebut that inference in other ways. And there's so much uncertainty to a trial, a jury trial in a civil case, as there are in other jury trials, that I just look at it as you know, another day that ends in y. Like, as far as I'm concerned when it comes to a civil case, like I will deal with that later.

And by the way, what is it, like one out of 10 are going to try? You know, when they're like upset that you're gonna pay an extra \$250,000, whatever it is, to get rid of this case I'm probably gonna be like, "Are you kidding me?" You absolutely want to pay that because we still got the government hanging out over here.

Adams: Yeah. It's too many to even count how many times I've been brought into a civil case where, oh, oops, there sounds like something criminal. And that's only in the cases where they've had the good sense to actually perceive that there was something criminal. Because there's been

somewhere, you know, other civil lawyers come to me and say, he testified in a deposition and I think what he testified to implicates him in a crime. That's a lot harder to unring a bell than--

Siegal: Yeah.

Adams: Hey, if I know what this guy's gonna say when asked this question, what should I do?

And then guy is like, you and I have to come in and say, " These are your options." And one of them involves prison because now you're in a sworn testimony situation, implicating yourself in a crime. And the other is availing yourself of a constitutional right. But you're probably gonna get hit with a civil judgment because this issue touches the ultimate merits.

Let's flip the script one more time in this situation.

Siegal: Flip away.

Adams: Move it to a different scenario.

Siegal: Okay.

Adams: The government has a criminal investigation, but there isn't any civil or regulatory action. And there's a potential to contemplate initiating civil litigation as a plaintiff, knowing that there's some kind of investigation you might be implicated in as either a subject or a target lingering out there.

Let's talk about that particular scenario. Because to the same token that the government can use civil investigative means to further criminal ends, there are certain, albeit more limited, I think, circumstances where you can use that same dynamic to your advantage as a plaintiff. Right?

Siegal: Yeah. To me this is where we show our worth, because we've gotta think out of the box, right?

I gotta assume if there's an investigation out there that something's gonna happen. And as soon as I hear investigation, I start doing my own internal investigation, or I advise the client to do that. And then I start to run through the strength of potential, you know, what potential claims could there be. What types are these gonna be? General intent or specific intent type of issues? Is it wire fraud, or is it something pretty elaborate, right?

And then try to construct what a defense would look like and then ask myself, are there targets out there? Like for example, would we turn and say we're not asserting an advice of accountant or a lawyer, or whatever defense, but we definitely consulted with experts. We definitely ran this by professionals before we made any kind of decision. And if the answer is yeah, then you have that capability to go, okay so obviously, you know their work papers, their own internal files are gonna be mentioning all of this and it's gonna substantiate what could be the beginnings of a defense. And also this is gonna cost a lot of money. This whole thing's gonna cost a lot. We need to put people on notice that we might be making indemnification claims. They should alert their carriers and that kind of thing.

So, it's like a general kind of planning out process, but you have to be open to strategic litigation to use nationwide subpoena power. The discovery process, depositions. I mean, I had a client accused of tax fraud and it was very specific intent. So, there was an assignor element to it. And we had an accountant who did all the work, right? But it turns out this accountant was the number one witness

for the government, too. Sue the guy, right? Take his deposition, put him in a position of, let's see whether he's gonna take the Fifth Amendment or not, right?

Try to tease that out as much as possible, right? Start building a case, and then maybe you also have something to offer to the government. When the government comes a-calling, if it's official or unofficial, you gotta think all of these things through. It's never just like one, two-dimensional, like starting point.

You kind of ease into it and you start thinking how you can use litigation. There are some discovery available in some jurisdictions without the need to file an actual lawsuit. For preservation purposes, right? So you've gotta know the rules, you've gotta know your jurisdiction, and I think what this is all coming down to Matt, is you really just gotta know as much as you can as soon as you can.

Adams: A mentor of mine calls this whole dance three-dimensional chess.

Siegal: Yes.

Adams: That as white-collar defense lawyers, we are constantly playing three-dimensional chess because...

Siegal: yes.

Adams: These scenarios are situationally specific and you really don't have a playbook. You have to let the facts and your instincts and your strategy guide where you go next. And in a lot of respects, as defense lawyers, sometimes -- I've said this to clients too -- we're really just feeling around in the dark tunnel, like the touch tunnel at the ...

Siegal: Yeah.

Adams: The amusement park with the kids and...

Siegal: Yeah.

Adams: And we're just like, all right, is that where we're gonna fall down over there? Or are we gonna be able to get around the And we have to be thinking two and three and four steps ahead. And I like what you said, it's not just this two-dimensional aspect. And a lot of civil litigation is two-dimensional.

Siegal: Yeah.

Adams: Because it's, let me file a complaint. Let me pound interrogatories. Let's get the information flow exchange. And it's just, we're playing in this sandbox here.

Whereas in these parallel type environments, we could be playing in two and three and four different forums all at the same time while trying to manage the messaging, trying to manage the information flow and dealing with various standards about when and if we can say "Timeout, we're not participating." And what the implications of that would be under invocations of the Fifth Amendment. Now ...

Siegal: I was just gonna say just think about this -- this just came to my mind -- is you're anticipating a request from the government saying, hey, produce all these documents, maybe in a civil or

regulatory. So, you file this lawsuit to get a whole bunch of documents that you want to be able to produce to the government. Like we need these people's files, right? Our files will not tell the whole picture. We need these other people's files. There's an example where, you could use that, right? You could use strategic litigation to think through and try to beat the government to the punch. So, I don't know. I t just came to my mind.

Adams: And then let's turn the tables one last time, because the counter-argument to everything that we're talking about in using proactive civil litigation as a plaintiff to counter being either the subject or target of an investigation carries risks. And I would even go as far as to say, becoming a plaintiff in the civil litigation may be the exception and not the rule. Although I don't keep statistics on it, I'm just saying I can think of more problems with that approach than I can think of solutions.

Although when the solutions actually pan out, you're a hero. But there's certainly a plethora of problems. And one that comes to mind is Fifth Amendment waiver concerns. Talk about some experiences there.

Siegal: Yeah, you do have to be very careful about what you put in your complaint. You do have to be very careful of how you frame the litigation.

Is a malpractice case the same as the subject matter of the government's investigation? Is it the same as waiving your rights as to specific claims and counts that the government might get an indictment for? Is there ways in which you can more generally approach what you're doing to say like, whatever I was intentionally involuntarily doing, it was not waiving my Fifth Amendment rights.

Adams: Right.

Siegal: Now, the other side will get wind of what's going on. So, you will confront the problem directly. And what you can always count on in civil litigation is, everything is a negotiation process and everything is a dance as you've been saying, right?

You can continue to press your claimant saying, "Hey, this has nothing to do with that. I've looked at the work that you did, and it's substandard whether the government's talking to us or it's not talking to us." So I can figure out ways in which to explain to a court that I can't file lawsuits without a basis, I can't file lawsuits without having bonafide causes of action.

And if the idea here is bring in the professionals and people because they have done something just generally that violates the standards of their own industry. But oh, it has an incidental impact on what we might be doing. The idea here is everyone may understand that over here is this mess. And to some extent, the defendants have to be worried about that mess as well, because they don't want to get swept into a government investigation. So, we don't want to make it worse. They don't want to get involved.

And so, the ways in which this has been successful is where everybody understands it's really not about what the government's doing. It's about our own issues between us, regardless of whether there's an incidental benefit or not. And of course, the other side is always, "I'm gonna make your guy take the Fifth Amendment." And so what you need to do is be ready for that, and know that's going to happen or they're gonna try to make that happen.

And you just deal with it.

Adams: I've talked to many federal prosecutors who actively monitor the civil dockets when these kind of parallel scenarios arise. And one of the principle things in addition to Fifth Amendment waivers that presents is Fourth Amendment waivers.

Siegal: Yep.

Adams: Because you're now in, say, a motion, putting forth documents and records and affidavits that might otherwise require the government to work a whole lot harder than just going on PACER and plucking something off of a docket. So, there's definitely lots to consider.

We are all out of time for today, Jack, but something tells me this won't be the last time that you're a guest on "The Presumption of Innocence."

But today's topic, the three-dimensional chess of navigating the Fifth Amendment in parallel proceedings, has really been great talking about with you. Welcome to the firm, and I'm delighted that we can offer your scope and breadth of expertise in one of our newest markets, but generally speaking, nationwide.

Really a tribute to the growth of our practice and the growth of our firm over the last several years. And it's going to be great to work with you moving into the future. That's all the time we have for today, and we'll see you next time on "The Presumption of Innocence."